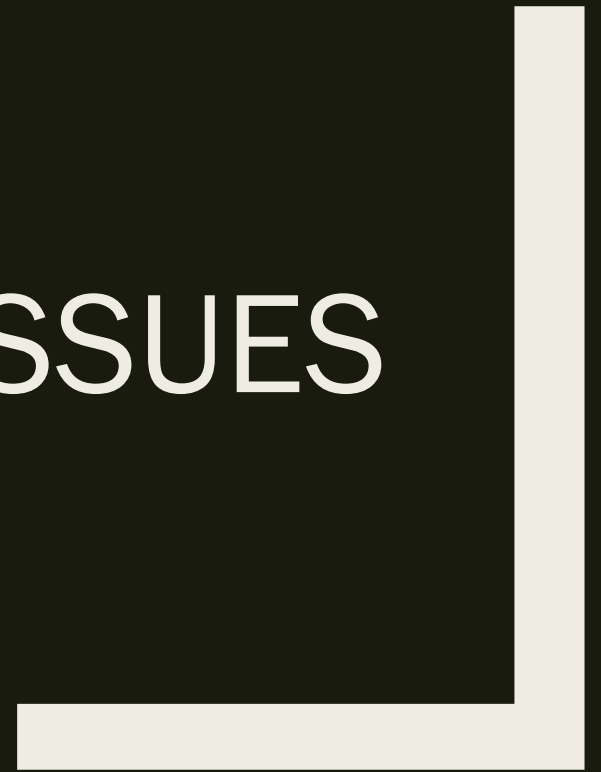




# CASE REVIEW 2020

Jonathan Voegeli

# SUBSTANTIVE LAW ISSUES



## *Banks v. Spirit Aerosystems*

- ALJ denied Banks' claim, citing he failed to show that his work accident was the prevailing factor in his injury.
- Banks asserted a “**void-for-vagueness**” constitutional argument, arguing that the term “prevailing factor” as defined by K.S.A. 44-508(g) was too vague and thus void.

457 P.3d 213 (Kan. Ct. App. 2020)

- The Court of Appeals:
  - *Declined application of the void-for-vagueness doctrine*
  - *Discussed proper application in criminal punishment/high civil penalty cases*
  - *Compared Workers Comp to economic or business regulation where application of doctrine is inappropriate.*
- Takeaways:
  - *The Court of Appeals left open the question of judicial interpretation of the definition of prevailing factor.*
  - *Called the statutory definition “circular”*

# *Rickson v. Kerns Construction*

- In June 2014, Rickson suffered work-related injury and was placed on light duty restrictions.
- In October 2014, a confrontation between Rickson and his employer led Rickson to give his two-weeks' notice.
- The employer told Rickson to get his things and leave immediately.

## **Question Presented:**

What effect, if any, does a termination upon receipt of a resignation notice have on an employee's benefits?

- The Court of Appeals:
  - *Utilized case law from two unemployment cases:*
    - when "...employees voluntarily give an employer notice of a date certain on which they intend to resign yet are terminated before that date, they are due unemployment benefits up to, but not after, that date."
  - *Applied similar rule to WC benefits:*
    - The Claimant's wage loss after his stated resignation was caused by the resignation, not by his injury.

## *Cramer v. Presbyterian Manors*

- Claimant suffered a back injury while performing her work duties as a laundry assistant.
- Treating physician diagnosed Claimant with a back strain, referred left leg pain, and preexisting degenerative disc disease.
- When Claimant reached MMI, she was placed on permanent restrictions which her employer could not accommodate.

### ISSUE:

Should aggravation of a previously-asymptomatic preexisting condition be considered in a permanent partial disability award?

### ■ Arguments:

- 44-510e(a)(2)(B): *“all impairment that flows from the injury should be awarded”*.
- *Alternatively, secondary-injury rule.*

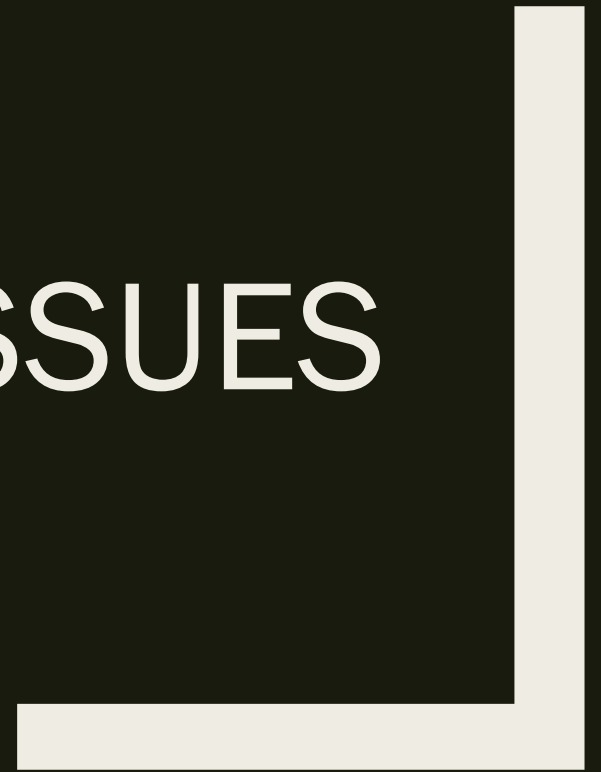
### ■ The Court of Appeals:

- *Either way, the injury and all impairments associated with it must be **caused primarily by the work accident**.*
- *Prevailing factor standard applies to all impairments for which Claimant seeks compensability.*

## *Munoz v. Southwest Med. Ctr. & Kan. Health Serv. Corp.*

- Claimant fell at work after passing a food cart to a fellow coworker, suffering several injuries including one to her lower back.
- Claimant had preexisting conditions in her low back:
  - *desiccated discs with degenerative change and osteophyte formation*
- Post-accident an MRI revealed bilateral spondylitis.
- COIME determined some of Claimant's impairments resulted from the work injury and some were preexisting.

# PROCEDURAL ISSUES



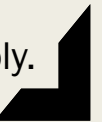
# Guess Who's Back: *Woessner v. Labor Max*

- *Issue 1: Was the drug testing admissible under 44-501(b)(3) and K.A.R. 51-3-5a?*
  - *Additional requirements noted in 44-501(b)(3) did not apply because language clearly states those requirements only apply when an employer is collecting the sample.*
  - *K.A.R. 51-3-5a requires medical records and reports to be stipulated to by the parties or supported by testimony of medical personnel.*
    - *Here, Claimant did not stipulate to the drug test's admissibility nor did any medical provider testify as to its contents.*



Kansas Supreme Court:


Test Result was not a report, record, or statement within the regulation's meaning, and since no preliminary hearing was held, the requirement for testimonial support did not apply.






## Woessner cont'd.

- *Issue 2: Did clear and convincing evidence demonstrate that Claimant's drug impairment had not contributed to the accident?*
  - ***Burden shifting:***
    - *Positive drug test (a defense) triggered presumption that impairment contributed to the accident*
    - *Burden shifted to Claimant to disprove presumption.*



Coworker testimony working alongside Claimant just prior to the accident combined with Respondent's expert witness's inability to affirmatively opine on Claimant's level of impairment presented enough evidence to overcome the presumption.



# WHEN DO PAYMENT OBLIGATIONS BECOME DUE?

*Gould v. Wright Tree Service and Aikins v. Gates Corp.*

# Guess Who's Back: *Gould v. Wright Tree Serv.*

- **Issue:** Did Respondent's appeal to the Court of Appeals have any effect on Claimant's ability to seek redress in district court for payment of a Board award under 44-512a?
  - *Did subsequent payment directly to medical providers satisfy any payment obligations owed by Respondent?*
- Among other findings, the Board awarded Gould \$106,886.69 in past due medical expenses on August 25, 2018.
- Gould sent a timely 20-day demand letter for payment. Wright failed to respond, and instead filed an appeal to the Court of Appeals.
- Upon expiration of the 20-day demand, Gould filed in district court to collect a money judgment as allowed by 44-512a.
- During two years of litigation, Wright's carrier made payments directly to two medical providers and reimbursed Gould's personal health insurance at an adjusted amount.

# *Gould* cont'd.

Kansas Court of Appeals:

Wright's appeal had no effect on the date its payment obligations came due under 44-512(b).

“In conclusion, Gould followed the statutory procedure set forth in K.S.A. 44-512a by serving his demand letter for unpaid medical expenses on Wright. Upon the expiration of 20 days, Gould was entitled to seek civil penalties and enforce the workers compensation award in the district court. For its part, upon receipt of the demand letter, Wright had the choice of making a timely payment or having Gould invoke the enforcement provisions of the statute. Wright chose the latter course of action.”

# Aikins v. Gates Corp.

- ALJ issued Aikins an award for compensation on May 1, 2018.
- Eight days later, Aikins served a 7-Day demand for payment.
- The day after being served with the demand, Gates filed an appeal with the Board requesting review of the award.
- Aikins sought and ultimately was awarded penalties by the ALJ, who cited *Nuessen* and *Gould*.

**Issue:** Does the rule articulated in *Nuessen* and *Gould* regarding the lack of automatic stays of payment obligations upon judicial review apply in cases where Board review is pending?

- Short Answer: No.
- Analysis:
  - *Under 44-551, an award becomes payable and due:*
    - When the Board issues its decision on the award its asked to review;
    - The 31<sup>st</sup> day after arguments are presented to the Board if the Board has not yet issued a decision on said award.
    - The 11<sup>th</sup> day after an ALJ's issuance of the award if no party seeks review within the requisite 10-day window.
  - *Until one of the instances above occurs, Claimant may not seek proceed with, nor may an ALJ issue any penalties for nonpayment.*

# THE COURT'S ROLE IN REVIEW

*Hughes v. City of Hutchinson, Via Christi Hosps. Wichita, Inc. v. Kan-Pak, LLC, and Netherland v. Midwest Homestead of Olathe Operations LLC*

# *Hughes v. City of Hutchinson*

- Differing medical opinions led to conflicting impairment ratings.
- Respondent filed a submission brief requesting its doctor's impairment rating of 13%. Claimant did not file a submission brief.
- The ALJ issued an award in accordance with Respondent's request. Claimant appealed, asserting the ALJ "erred in his determination of the nature and extent of Claimant's disability".
- The Board affirmed the ALJ's finding that Claimant failed to show the additional ailments he suffered from were related to the work injury he sustained.

The Court of Appeals, in affirming the Board's findings, reiterated its administrative review limitations, stating "**we cannot reweigh evidence, resolve conflicting evidence, or make credibility determinations**" adding that the court will **continue "to uphold...Board decision[s] if [they are] supported by substantial evidence**, even though there is other evidence in the record supporting contrary findings".

# *Netherland v. Midwest Homestead of Olathe Operations LLC*

- Compensability of the claim was challenged from the onset, resulting in an ALJ's finding and the Board's affirmation of compensability.
- After a regular hearing, the ALJ set terminal dates. On its terminal date, Respondent filed a motion for extension citing its need to depose five additional deponents.
- The ALJ found good cause to extend for the deposition of one of Respondent's witnesses, but quashed the request as to the remaining deponents.
- In its request for review of the ALJ's subsequent award, Respondent particularly questioned the ALJ's decision to exclude its remaining depositions.
- The Board reversed and remanded the ALJ's award, calling the ALJ "overly critical" and instructed the remaining depositions be taken.
- Following review of all the evidence, including the additional deposition testimony, the ALJ again issued an award for the Claimant and included a lengthy discussion about what he called the Board's 'denial of justice'.
- The Board affirmed the ALJ's award.



## *Netherland* cont'd.

- Respondent appealed to the Court of Appeals, asserting among other arguments that its due process right to a fair hearing was denied by the ALJ's personal animus against it, and that the Board abdicated its responsibility to provide independent review.
- The Court of Appeals quickly pointed out that Respondent failed to raise the issue of its due process right at the lower levels required under Rule 6.02(a)(5).
  - *Raising the essence of an issue is insufficient to preserve it for appellate review.*
  - *6.02(a)(5) requires citation to the record of both where the issue was raised and where it was ruled on at the lower level.*

## *Via Christi Hosps. Wichita Inc. v. Kan-Pak, LLC*

### ■ BACKGROUND:

- *Only the 2011 Fee Schedule statute included the language, “**whichever is least**” with its methods of determining medical provider reimbursement amounts.*
  - *No one knows how that language got included.*
  - *Methods:*
    - 70% of total billed if total exceeds \$60,000.
    - Medicare Severity-Diagnosis Related Group (‘MS-DRG’) method.
- Provider billed over \$1 million in treatment for injured worker’s severe burns.
  - Carrier reimbursed provider only 15% of total billed amount (\$136,451.60) using MS-DRG method, citing the “whichever is least” method.
  - A hearing officer and the Board found that to be the proper amount, despite protest from provider.

## *Via Christi cont'd*

- The Court of Appeals overturned the lower rulings.
  - *Said the Board's enforcement of the schedule was unreasonable, arbitrary, and capricious.*
  - *Because the language at issue was included by accident.*

### ■ Kansas Supreme Court:

- *44-510j provides a narrow purpose of resolving fee disputes.*
- *The Board's application of the plain language of the statute was not unreasonable, arbitrary, or capricious.*
- *The issue of the rulemaking process was never properly before the Board, thus*
- *the Board was correct in refusing to expand the parameters of the dispute statute.*

# STATUTE OF LIMITATIONS & EQUITABLE ESTOPPEL

*Castro-Trejo v. Yolanda Moreno & Travelers Prop. & Cas. Co. of Am.*



## *Castro-Trejo v. Yolanda Moreno*

- Claimant filed an application in May 2015 for benefits following a work accident which resulted in an elbow, wrist, and head injury.
- In January 2017, Claimant filed a Notice of Intent. Neither Respondent nor its carrier replied. Claimant took no further action.
- In August 2017, Claimant's counsel made a settlement offer to OC.
- Employer's counsel indicated he did not have authority accept.
- Several more attempts to settle by Claimant's counsel allegedly went unanswered.

- At hearing for dismissal, where Respondents were represented by new counsel, Claimant admitted that conditions for dismissal were met.
- Sought judicial review and asserted equitable estoppel remedy.

### The Court of Appeals:

- *Intent to deceive is a requirement for an equitable estoppel claim*
- *Also considered whether actions by Respondents' counsel "lulled [Claimant] into inaction in preserving his rights".*

*Found that lack of response from OC should have triggered Claimant into protecting his rights because it indicated that settlement negotiations were not on-going.*